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SCHMITZ AUSTIN 02CV2485 032703 DANE CTY CIR CT

MAR 28 2003

STATE OF WISCONSIN

CIRCUIT COURT
Branch 12

DANE COUNTY

AUSTIN J. SCHMITZ,
Petitioner,

vs.

WISCONSIN DEPARTMENT OF
REVENUE,
Respondent.

COPY

Case No. 02 CV 2485

ORDER

I. INTRODUCTION

Petitioner in this case, Austin J. Schmitz, is asking for relief from taxation of drugs in the amount of \$34,239.10 pursuant to Wis. Stat. §139.87 by Respondent, Wisconsin Department of Revenue (DOR), and a refund of \$397.91 plus interest seized by DOR, pursuant to that taxation. For the reasons set forth below, the Petitioner's motion is denied.

II. STATEMENT OF THE CASE

On July 31, 1992, Mr. Schmitz was arrested in possession of 4772 grams of marijuana. On September 24, 1993, pursuant to Wis. Stat. § 139.87, the Wisconsin Tax on Controlled Substances, Mr. Schmitz received a Notice of Amount Due for \$34,239.10.¹ On January 31, 1994, Mr. Schmitz was convicted of possession of marijuana pursuant to Wis. Stat. §§161.14(4)(t), 161.41(1)(b)(2), 939.05. Sentence was imposed and stayed and 30 months probation was ordered. Between September 24,

¹ 4772 grams multiplied by \$3.50 per gram for a total of \$16,702.00 for tax stamps for the marijuana plus \$835.10 interest plus \$16,702.00 as a penalty equal to the amount taxed (for not having the tax stamps) for a total of \$34,239.10.

1993, the date of the notice, and September 2000, \$397.91 has been seized from Mr. Schmitz by the DOR pursuant to that notice.

On September 19, 2000, Mr. Schmitz requested a redetermination of his tax liability and a refund of the \$397.91 already seized. By letter dated September 12, 2001, James G. Jenkins, Chief, Alcohol & Tobacco Enforcement, denied Mr. Schmitz's claim, stating that Mr. Schmitz claim was not timely

On October 23, 2001, Mr. Schmitz appealed this decision with a petition with the Wisconsin Tax Appeals Commission (WTAC). By motion dated November 27, 2001 the DOR sought an order from WTAC dismissing Schmitz's petition. On December 11, 2001, Mr. Schmitz filed a cross-motion for summary judgment.

On July 10, 2002 the WTAC denied the motion for Petitioner's summary judgment and granted DOR's request for summary judgment and dismissed Mr. Schmitz's petition for review. WTAC supported Chief Jenkins original finding that Mr. Schmitz's claims were not timely.

On August 5, 2002, Mr. Schmitz petitioned the Dane County Circuit Court for a review of the findings of the WTAC. On August 26, 2002, the court developed a schedule for further proceedings: Petitioner's Brief – September 28, 2002; Respondent's Brief – October 28, 2002; Petitioner's Reply – November 12, 2002. These briefs have been received and reviewed.

III. LEGAL CASE

The Petitioner relies on State v. Hall, 207 Wis. 2d 54, 557 N.W.2d 778 (1997). His central argument is that the claims he brought were filed in a timely fashion. Mr. Schmitz holds that the 2 year time limit under Wis. Stat. §§ 71.75(5) and 71.88 (1), do

not apply to Wis. Stat. § 139.87, the Wisconsin Tax on Controlled Substances, because §139.87 was determined to be unconstitutional by the Wisconsin Supreme Court. See Hall, 207 Wis. 2d 54, 557 N.W.2d 778. Therefore, the tax is invalid *ab initio*; if the law was never valid, then all things following from it are invalid, including any associated time limits. Other arguments are mentioned in WTAC briefs but are not developed. Petitioner addresses the central case relied upon by the Respondent, Gilbert v Wisconsin Department of Revenue, 246 Wis. 2d 734, 633 N.W.2d 218 (Ct. App. 2001) by dismissing it as an aberrant decision.

Respondent, DOR, holds that the 2 year time limit under Wis. Stat. §§ 71.75(5) and 71.88 (1), applies to Mr. Schmitz's case. DOR does not argue the inapplicability of Hall with regard to Wis. Stat. § 139.87, the Wisconsin Tax on Controlled Substances. However, DOR holds that even if Wis. Stat. § 139.87 is unconstitutional, this does not affect the 2 year time limit specified under Wis. Stat. §§ 71.75(5) and 71.88 (1). DOR holds that the unconstitutionality of § 139.97 and the timeliness of request for relief from taxation under §§ 71.75 (5) and 71.88 (1) are independent factors. Therefore, Mr. Schmitz's request for redetermination was untimely under §§ 71.75 (5) and 71.88 (1). DOR cites Gilbert v. Wis. Dep't of Revenue, 246 Wis. 2d 734, 633 N.W.2d 218 (2001), to support its position. Gilbert has a fact pattern almost identical to Mr. Schmitz's current situation. In that case and found that the issue of timeliness was separated from constitutionality. In addition, Gilbert affirmatively cites Hall in developing its conclusions.

IV. STANDARD OF REVIEW

The Standard of Review in this case is that of deference to agency determinations. Specifically whether the agency has 1) stayed within its jurisdiction, 2)

is in accordance with the law, 3) did not act arbitrarily, oppressively or unreasonably and it decision represented its will rather than its judgment, and 3) there exists evidence indicating that the agency might reasonably come to the decision it did. See State ex rel. Ruthenberg v. Annuity & Pension Bd., 89 Wis. 2d 463, 278 N.W.2d 835 (1979). To be overturned the agencies decision must be without rational basis. See Klinger v. Oneida County, 146 Wis. 2d 158, 430 N.W. 2d 596 (Ct. App. 1988).

V. MERITS

The Petitioner does not suggest that the respondent acted beyond its jurisdiction, acted arbitrarily, oppressively or unreasonably. Rather the Petitioner simply insists that the ruling of State v. Hall compels the result he seeks, an opportunity to challenge a tax assessment almost seven years after the fact.

This case, beyond any reasonable argument, is governed by the decision in Gilbert. The petitioner in this case is in a position virtually identical to that of the taxpayer-petitioner in Gilbert. Simply stated, the Gilbert decision is binding appellate authority which governs this case and permits no result other than one identical to that reached in Gilbert. The Petitioner has made no effort to distinguish his situation from that posed in the Gilbert decision and, indeed, it appears that there is no possible basis to do so. Absent a compelling basis, certainly not presented here, this court must follow the applicable appellate authority and that is precisely what the Gilbert decision is, Cook v. Cook, 208 Wis.2d 166, 560 N.W.2d 246; State ex rel Dicks v. Employee Trust Funds Board, 202 Wis.2d 703, rev. denied, 205 Wis.2d 135 (Ct. App. 1996). It is entirely insufficient to dismiss that authority as an aberration which is the argument submitted by the Petitioner.

The Petitioner suggests that the Gilbert decision conflicts with that of Hall. The Petitioner is mistaken. In the Gilbert decision, the court carefully considers the ruling set out in Hall and reaches the conclusion that Hall did not justify an otherwise untimely challenge to a drug-related tax assessment. Specifically, Gilbert addresses the fact that when relief is sought from the unconstitutional imposition of the Wisconsin Drug Tax Stamp law, all other laws regarding the timeliness of the request are still applicable. Gilbert holds a position exactly opposite of the Petitioner's position.

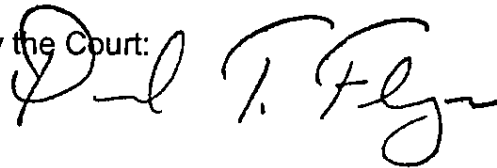
In early briefs and in occasional mention, the Petitioner mentions several alternative theories under which he suggested that relief should be granted. In the brief submitted in this proceeding, however, none of these alternative theories was developed sufficiently to be considered

VI. ORDER

For the reasons discussed above, the Petitioner's motion is DENIED.

Dated: March 27, 2003

By the Court:



Judge David Flanagan

cc: Attorney Robert Henak
AAG Mary E. Burke